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Supreme Court of the United States

OCTOBER TERM, 1938

No. 13

EARLE S. WELCH,
Appellant.

v.

ROBERT K. HENRY and SOLOMN LEVITAN, as State Treasurer of the State of Wisconsin,
Appellees.

APPELLEES' BRIEF

I

THE OPINION OF THE COURT BELOW

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin, dated January 14, 1938. The opinion delivered in support thereof, is reported under the title, *Welch v. Henry*, in 226 Wisconsin 595. It is based upon and affirms a prior decision of that court in the same case reported in 223 Wisconsin 319, upon a previous appeal from an order overruling a demurrer to the original complaint, where the questions here involved were originally considered.

II

STATEMENT OF THE CASE

This is an appeal in an action commenced against the Treasurer of the State of Wisconsin to recover $545.71 Emergency Relief Taxes levied by the State of Wisconsin pursuant to section 6 of Chapter 15, Laws of Wisconsin of 1935, paid under protest by the appellant. The facts involved herein are not in dispute and only questions of law are presented on this appeal.

Earle S. Welch, the appellant, a resident of the State of Wisconsin and engaged in the insurance business, received a gross income of $13,383.26 during the year 1933, consisting of: Commissions $608.74, rents $60.00, interest $558.42, and dividends $12,156.10. Of said dividends $4,153.60 thereof were received from the Eau Claire Press Company, Eau Claire, Wisconsin, a Wisconsin corporation, and $7,980.00 thereof were received from the National Pressure Cooker Company, Eau Claire, Wisconsin, a Wisconsin corporation. In said year 1933, appellant paid taxes of $72.68, paid interest in the sum of $1,420.25, expended $1,050.20 in ordinary and necessary business expenses, and sustained a net loss of $8,518.84 from the sale of securities, totaling $11,061.97. During the years he made donations, deductible for Wisconsin normal income tax purposes, in the sum of $100.00.

Under section 71.04 of Chapter 71, Wisconsin Statutes 1933, the above mentioned taxes, interest, business expenses, donations and loss on the sale of securities were all deductible from gross income in arriving at the 1933 net income taxable thereunder for normal tax purposes. Also dividends received by a resident of Wisconsin from all corporations attributing 50 per cent or more of their

entire net income to Wisconsin for income tax purposes and subject to Wisconsin income tax, were deductible under subsection (4) of said section 71.04 Wisconsin Statutes in determining the taxpayer's net income. By reason of these deductions the appellant paid no normal income tax to the State of Wisconsin on 1933 income.

Chapter 15 of the Laws of Wisconsin for 1935, was passed by the Wisconsin Legislature on March 6, 1935, approved by the Governor of Wisconsin on March 14, 1935, and published March 27, 1935. Section 6 thereof, entitled "Emergency Relief Tax on Certain 1933 Dividends" expressly provided for the levy and assessment of an emergency tax at graduated rates, payable on or before May 15, 1935, upon the "net dividend income" of all persons in the year 1933. "Net dividend income" taxable thereunder was defined as all dividends received in 1933 and deducted under subsection (4) of section 71.04 Wisconsin Statutes 1933, less $750.00.

Prior to May 15, 1935, pursuant to said section 6, Chapter 15 Laws of Wisconsin of 1935, there was assessed and levied by the State of Wisconsin, against the appellant an emergency relief tax of $556.84 computed upon the dividends from the Wisconsin corporations totaling $12,-133.60 received by him in 1933 and deducted in that year under the provisions of subsection (4) of section 71.04 Wisconsin Statutes 1933 for Wisconsin normal income tax purposes. This tax, less 2 per cent discount for prompt payment, was paid under protest on May 15, 1935. Subsequently the appellant taxpayer commenced action in the Circuit Court for Eau Claire County, State of Wisconsin as provided in said section 6 of Chapter 15, Laws of Wisconsin of 1935 for recovery of the tax so paid. He alleged that the tax so exacted was invalid because contrary to the provisions of the Wisconsin Constitution and vio-

lative of the due process clause and the equal protection provisions of the 14th Amendment to the United States Constitution. Upon appeal to the Supreme Court of Wisconsin said tax was held constitutional. It is from that decision that the appeal here is taken.

III

STATUTES INVOLVED

Chapter 15 of the Laws of Wisconsin for 1935 is entitled "An Act to Raise Revenues for Emergency Relief Purposes, and Making Appropriations." The material portions of section 6 thereof, here involved, are as follows:

"Section 6. Emergency Relief Tax on Certain 1933 Dividends.

"(1) For the purpose of this section.

"(a) 'Person' shall mean persons other than corporations as defined in subsection (1) of section 71.02.

"(b) 'Dividends' shall mean all dividends derived from stocks whether paid to shareholders in cash or property received in the calendar year 1933, or corresponding fiscal year, and deductible under subsection (4) of section 71.04.

"(d) 'Net dividend income' shall mean gross dividend income less seven hundred and fifty dollars.

"(2) To provide revenues for relief purposes there is levied and there shall be assessed, collected, and paid, an emergency tax upon the net dividend income of all persons in the calendar year 1933 or corresponding fiscal year at the following rates:

"(a) On the first two thousand dollars of net dividend income or any part thereof, at the rate of one per cent.

"(b) On the next three thousand dollars of net dividend income or any part thereof, at the rate of three per cent.

"(c) On all net dividend income above five thousand dollars, at the rate of seven per cent.

"* * *"

The normal income tax law of Wisconsin is Chapter 71 of the Wisconsin Statutes for 1933. The rates thereof appear in section 71.06 of said Chapter 71. The provisions for the deduction of dividends from certain corporations are contained in section 71.04 (4) of said Chapter 71, and read as follows:

"71.04 DEDUCTIONS FROM INCOMES OF PERSONS OTHER THAN CORPORATIONS. Persons other than corporations, in reporting incomes for purposes of taxation, shall be allowed the following deductions:

"(1) * * *
"(2) * * *
"(3) * * *
"(4) Dividends, except those provided in section 71.02 (2) (b) 2 and 3, received from any corporation conforming to all of the requirements of this subsection. Such corporation must have filed income tax returns as required by law and the income of such corporation must be subject to the income tax law of this state. The principal business of the corporation must be attributable to Wisconsin and for the purpose of this subsection any corporation shall be considered as having its principal business attributable to Wisconsin if fifty per cent or more of the entire net income or loss of such corporation after adjustment for tax

purposes (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by chapter 71, * * *"

IV

SUMMARY OF ARGUMENT

A. The tax involved herein is an income tax and as such is validly imposed at graduated rates.

B. The imposition of the tax in question is based upon a reasonable classification.

C. The tax involved herein is not a substitute tax.

D. The tax in question is not invalid because retroactive.

V

ARGUMENT

A. THE TAX INVOLVED HEREIN IS AN INCOME TAX AND AS SUCH IS VALIDLY IMPOSED AT GRADUATED RATES.

Section 1 of Article VIII, Wisconsin Constitution, as amended in 1908, provides:

> "Section 1. * * * Taxes may also be imposed on incomes, priveleges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

It is not to be doubted that under the above constitutional provision the State of Wisconsin has the power to impose a tax upon income at graduated rates and provide for reasonable exemptions.

Income Tax Cases, (1912) 148 Wis. 456 (writ of error dismissed 231 U. S. 616);
New York ex rel Cohn v. Graves, (1937) 300 U. S. 308;
Brushaber v. Union Pac. R. Co., (1916) 240 U. S. 1.

The appellant does not contend that the tax here involved is invalid as an income tax because it is imposed at graduated rates. His contention is that the tax is not an income tax but is a property tax which may not be imposed at graduated rates. Thus his argument in reference to invalidity because the tax is imposed at graduated rates is applicable only if the tax is a property tax.

On its face section 6 of Chapter 15, Laws of Wisconsin of 1935, clearly imposes an income tax levied purely for revenue purposes. It expressly says that the tax is laid upon the "net dividend income" received in the year 1933. The income thereby taxed is that which is received as dividends. "Dividends" are expressly defined as meaning "all dividends derived from stocks," whether paid in cash or property, received in the year 1933 and which were deductible under subsection (4) of section 71.04 Wisconsin Statutes of 1933 for Wisconsin normal income tax purposes. The net income by which the tax is measured is the total received from that type of dividends after deducting therefrom a flat sum of Seven Hundred Fifty Dollars. The tax is not imposed upon the gross amount received from such dividends but is specifically laid upon the net income from that source. It is thus a special income tax measured by the income from a particular type of receipts.

Income is the gain or profit which is received. It has been defined as the

"* * * 'gain derived from capital, from labor, or both combined,' * * *"

"* * * a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the

capital however invested or employed, and *coming in*, being 'derived,' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. * * *"

Eisner v. Macomber, (1920) 252 U. S. 189, 207.

Dividends from coporate stocks received in cash or property, except liquidating dividends and certain dividends by a corporation in its own stock, represent, in the hands of the person receiving the same, a gain derived from capital invested and are not a return of the capital itself.

Lynch v. Turrish, (1918) 247 U. S. 221;
Lynch v. Hornby, (1918) 247 U. S. 339;
Peabody v. Eisner, (1918) 247 U. S. 347;
Eisner v. Macomber, (1920) 252 U. S. 189;
Koshland v. Helvering, (1936) 298 U. S. 441.

Thus, a tax measured by dividends received is measured by the amount of gain received by the recipient from capital invested. It is therefore a tax upon the income which came to the recipient from that source and is not upon the property itself. Such tax has all the elements of and is an income tax.

In determining income for the purposes of imposing an income tax thereon there is no constitutional necessity for any deduction from the gross amount received. The only requirement is that such deduction be made as will arrive at what is in fact income. Such deductions are composed of only those items which are expenses involved in the production of the income or necessary to effect a restoration of capital.

Davis v. U. S., (C.C.A. 2, 1937) 87 Fed. (2d) 323, (certiorari denied by this court June 1, 1937, 301 U. S. 704, rehearing denied October 11, 1937, 302 U. S. 773).

In that case the above principle which underlies all taxation of income as such was clearly recognized where it was said at page 324 of the opinion:

"It will be well to note at the start that our scheme of income taxation provides for a method of computation whereby all receipts during the taxable period which are defined as gross income are gathered together and from the total are taken certain necessary items like cost of property sold; ordinary and necessary expenses incurred in getting the so-called gross income; depreciation, depletion, and the like in order to reduce the amount computed as gross income to what is in fact income under the rule of Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570, and so lawfully taxable as such. In this way true income is ascertained by taking from gross income as defined that which is necessary as a matter of actual fact in order to determine what as a matter of law may be taxed as income. While such subtractions are called deductions, as indeed they are, they are not to be confused with deductions of another sort like personal exemptions; deductions for taxes paid; losses sustained in unrelated transactions and other like privileges which Congress has seen fit to accord to income taxpayers under classifications it has established. While the first kind of deductions are inherently necessary as a matter of computation to arrive at income, the second may be allowed or not in the sound discretion of Congress; the only restriction being that it does not act arbitrarily so as to set up in effect a classification for taxation so unreasonable as to be a violation of the Fifth Amendment. * * *"

Where a tax is measured by so much of the amount received as is in excess of any deductions necessary to arrive at true income such tax is one measured by the income received and so is an income tax. That part of the amount received which does not represent the return of capital is the income received. That is, in order for a tax to be a valid income tax it must be imposed on that which is

income, but in determining what is income it is only necessary that there be subtracted from the total received such deductions as have a direct bearing upon the cost of producing that which is received and relates to the source from which derived. Where no part of the amount received represents the cost of producing it there is no necessity for any deductions therefrom and the entire amount received constitutes income in the hands of the person receiving the same. In such instance the fact that the amount received from a particular source and the income therefrom co-incide in amount does not in any manner prevent the whole of the amount from being income. They are then both one and the same amount. It follows then that a tax measured by the amount received where there is no necessity for any deduction is a tax measured by and laid upon income and is an income tax.

The distinction between a tax measured by gross receipts and one measured by net income is shown by this Court in *U. S. Glue Co. v. Oak Creek*, (1918) 247 U. S. 321, at page 328, 329, where it was said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. * * *"

By their very nature, dividends on corporate stock, other than liquidating dividends and certain dividends in stock of the corporation, are income to the recipient. Such dividends represent a residue remaining after all costs of production or expenses relating thereto have been deducted by the corporation prior to the declaration and payment of such dividends. When a person owning stock receives such dividends they are in fact net gain from capital invested and as such constitute income in his hands. Therefore a tax measured by the amount of corporate dividends received is a tax upon income received and is an income tax and not a property tax.

In the case of *U. S. v. Hudson*, (1937) 299 U. S. 498, this Court said at page 500:

> "The taxing provision does not impose a tax in respect of all transfers, but only in respect of such as yield a profit over cost and allowed expenses. If there be no profit there is to be no tax. If there be a profit the tax is to be 50% of it. Thus a profit is made the occasion for the tax and also the measure of it. Because of this, counsel for the Government contend that the tax is a special income tax; and we think the contention is sound."

Whether or not the statute imposing the tax here under consideration provides for a deduction of interest paid or losses sustained in unrelated transactions, or even those involved in a dealing in the corporate stock upon which the dividends taxed were received, presents no constitutional question as to the validity of the tax. Losses sustained upon the sale of assets would have to be taken into consideration only upon a determination of whether the taxpayer received any gain upon disposal of the assets themselves. Similarly interest paid would only enter into the situation where the taxpayer's income from all sources

was being considered and it was shown to have some direct bearing upon the production of the income taxed.

The record here does not show that the losses sustained or the interest paid by the appellant in 1933 were related in any manner to the dividends received by him in that year. Nor does he make any claim that he had any expenses during that year which related to said dividends or the production thereof. Even if the non-allowance of a deduction for such losses sustained and interest paid did present a question as to the constitutionality of this taxing statute, the appellant is not in a position here to even raise that question. He may not be heard to complain in reference to a situation which as to him does not exist. He is not the champion of any rights except his own.

> *Henneford v. Silas Mason Co.*, (1937) 300 U. S. 577, 583.

In determining taxable income for the purposes of imposing an income tax thereon the legislature usually allows deduction to be made for taxes, losses or unrelated transactions and personal exemptions. Deductions of this type may be allowed, limited or wholly denied in the discretion of the legislative body as they are purely a matter of legislative grace and not a matter of right.

> *New Colonial Ice Co. v. Helvering*, (1934) 292 U. S. 435;
> *Helvering v. Independent L. Ins. Co.*, (1934) 292 U. S. 371.

Accordingly the appellant cannot question the validity of the allowance of the deduction of a flat amount of Seven Hundred Fifty Dollars from the dividends received in arriving at the income upon which the tax is imposed. Nor may he predicate any argument founded upon the effect thereof. Such deduction is within the

class of discretionary allowances which are a matter of legislative grace.

The contention of the appellant that the tax in question is invalid because of the imposition of the tax at graduated rates and the allowance of a flat deduction is applicable only if the tax were in fact a property tax. It is however an income tax which the State of Wisconsin has the power to impose. Art. VIII, Sec. 1 of the Wisconsin Constitution expressly authorizes the imposition of an income tax at graduated rates and with the allowance of exemptions. Income taxes imposed at graduated rates and providing for reasonable exemptions have been consistently sustained upon the theory that such taxes are laid upon the individual in proportion to his ability to pay, such ability being measured by his income.

> *Income Tax Cases,* (1912) 148 Wis. 456 (writ of error dismissed 231 U. S. 616);
> *New York ex rel Cohn v. Graves,* (1937) 300 U. S. 308.

In order that a tax on income bear a relationship to ability to pay it is not necessary that it be imposed upon all income from all sources and take into consideration all expenses and losses.

> *Colgate v. Harvey,* (1935) 296 U. S. 404;
> *Helvering v. Independent Life Ins. Co.,* (1934) 292 U. S. 371;
> *Denman v. Slayton,* (1931) 282 U. S. 514;
> *Travis v. Yale & Towne Mfg. Co.,* (1920) 252 U. S. 60;
> *Brushaber v. Union Pac. R. Co.,* (1916) 240 U. S. 1.

An income tax has been sustained as such even though the deductions allowed were limited to those relating to the income which was taxed.

Travis v. Yale Towne Mfg. Co., (1920) 252 U. S. 60.

A tax measured by the income from a particular locality is nevertheless a valid income tax.

Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60;
Schaffer v. Carter, (1920) 252 U. S. 37.

The tax here involved is an income tax because it is imposed upon and measured by income. This is true notwithstanding that the tax is imposed upon and measured by income from a particular source.

U. S. v. Hudson, (1937) 299 U. S. 498;
Louisville Provision Co. v. Glenn, (D. C. Ky. 1937) 18 Fed. Sup. 423;
R. Hoe & Co. Inc., v. Commissioner of Int. Rev., (C. C. A. 2, 1929) 30 Fed. (2d) 630.

The tax involved in the *Hudson* case was measured by the profit which arose solely from the sale of silver bullion. This Court sustained that tax as a special income tax.

Under the scheme of taxation passed upon in the *Hudson* case the tax has an effect which is identical with that of the tax here involved. There the income upon which the tax was imposed and by which it was measured arose from only one class of transactions. Any other operations of the taxpayer were not taken into consideration. The income taxed was the profit or gain realized by the taxpayer from the particular transactions. Deduction from the gross amount received was allowed only for those costs and expenses necessary to the producing of such profit. The resultant income which was taxed represented the gain actually realized from such transactions. The tax was sustained as a special income tax.

The tax here involved, imposed by section 6 of Chapter 15 of Laws of Wisconsin of 1935, is laid upon and measured by the income received solely from dividends previously exempted from taxation for normal income tax purposes. No other transactions of the taxpayer during the period are taken into consideration. The dividend income which is taxed is, by its very nature, the gain received by the taxpayer from the ownership of the stock upon which the dividends were declared and paid. There was no occasion for the allowance of any deduction for costs or expenses relating to the production thereof because payment thereof had already been made by the corporations before distribution of such dividends. Thus the amount of dividends received represented the gain actually realized during 1933 by the taxpayer from the ownership of the stock. Therefore the imposition of the tax measured by the net dividend income, arrived at by subtracting the sum of Seven Hundred and Fifty Dollars from the total dividends received in the year, effects a tax which is laid upon the gain realized from the particular source. It would therefore seem conclusive that the tax here involved is likewise an income tax. The tax passed upon in the *Hudson* case being an income tax it seems inescapable that the tax imposed by section 6 of Chapter 15 of the Laws of Wisconsin of 1935 is also an income tax.

The cases cited by the appellant as authority for his contention that the tax in question is not an income tax do not support that proposition.

Of such cases the following involve the question of the power to tax and hold that income received from the state or federal governments, or an agency thereof, is not subject to tax directly or indirectly by the other government, under the doctrine of intergovernmental immunity:—

Northwestern Mutual Life Ins. Co. v. Wisconsin, (1927) 275 U. S. 136;
National Life Ins. Co. v. United States, (1928) 277 U. S. 508;
Federal Land Bank v. Crosland, (1923) 261 U. S. 374;
Macallen Co. v. Massachusetts, (1929) 279 U. S. 620;
Willcuts v. Bunn, (1931) 282 U. S. 216.

The following cases so cited by appellant are concerned only with the question of whether the imposition of an income tax on certain income impairs the obligation of contract:

Adam Manufacturing Co. v. Storen, (1938) .... U. S. ...., 58 S. Ct. 913;
Hale v. State Board of Assessment and Review, (1937) 302 U. S. 95.

The tax involved in these cases so cited is a tax laid as a property tax:

Senior v. Braden, (1935) 295 U. S. 422;
Dawson v. Kentucky Distilleries etc., (1921) 255 U. S. 288;
Thompson v. McLeod, (1916) 112 Miss. 383;
In re Cope's Estate, (1899) 191 Pa. 1.

The remaining cases cited by appellant to sustain his contention pertain to taxes levied upon gross sales or receipts as such and without any relation to true income. Such cases are:

Stewart Dry Goods Co. v. Lewis, (1935) 294 U. S. 550;
Schuster v. Henry, (1935) 218 Wis. 506;
State ex rel Botkin v. Welsh, (1933) 61 S. Dak. 593.

B. THE IMPOSITION OF THE TAX IN QUESTION IS BASED UPON A REASONABLE CLASSIFICATION.

It is well established that the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation, and that the power to classify for purposes of taxation is of wide range and flexibility. The classification is valid if reasonable and rests upon some ground of difference or distinction having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike.

> *Louisville Gas & Electric Co. v. Coleman*, (1928) 277 U. S. 32;
>
> *Colgate v. Harvey*, (1935) 296 U. S. 404;
>
> *Citizens' Telephone Co. v. Fuller*, (1913) 229 U. S. 322.

"* * * The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & L. Co. 240 U. S. 342,

60 L. ed. 679, L.R.A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 55 L. ed. 350, 32 S. Ct. 192. As was said in Brown-Forman Co. v. Kentucky, supra, (217 U. S. 573, 54 L. ed. 887, 30 S. Ct. 578):

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear."

State Board of Tax Commissioners of Indiana v. Jackson, (1931) 283 U. S. 527, 537.

The tax imposed by section 6 of Chapter 15 of the Laws of Wisconsin of 1935 is a tax measured by and laid upon the income received in 1933 from corporate dividends which were deducted from taxable income for normal income tax purposes in Wisconsin in 1933 under the provisions of subsection (4) of section 71.04 Statutes of Wisconsin of 1933. It is to be noted that the dividends thus deducted in 1933 were not solely or necessarily those received from stock in Wisconsin corporations as distinguished from dividends from stock in out of state corporations. The allowed deduction extended to dividend income received by Wisconsin residents from *all* corporations whose income was subject to income taxation in Wisconsin in that year.

At the outset the recipients of dividends from corporate stocks stand in an entirely different situation from the recipients of other types of income, because dividends when received come into the hands of the persons receiving them free of expense and are in fact net gain. Other types of income do not necessarily represent the gain or profit received by the recipient. There is thus a very real and distinct difference between dividend income and other types of incomes. The recipients of dividends therefore are in a separate and distinct class from persons receiving income from other sources, which classification for income tax purposes is founded upon a reasonable existing distinction.

Separte classifications of recipients of dividends may also exist where there is substantial difference and distinction between such recipients upon which to found a classification. Persons in Wisconsin who received dividends from corporate stock in 1933, which they were allowed to deduct from taxable income of 1933 for Wisconsin income tax purposes of that year, stand in an entirely different situation from persons in that state who received corporate dividends in that year which were not deductible. They likewise stand apart from other taxpayers who received other types of income which were subject to tax. By reason of the deductibility of the dividends received in 1933 the persons receiving them have paid no income tax to the State of Wisconsin in proportion to their ability to pay as measured by the income thereby received. They have not borne any part of the cost of government of the State of Wisconsin for the protection afforded to them and the benefits derived therefrom in respect to the reception of said dividends and the enjoyment thereof. Those persons who received non-deductible corporate dividends in 1933, as well as persons who received income in 1933 from other sources, paid to the state

their share of the burdens of govenrment. In the hands of one class the dividend income was subjected to tax but in the hands of the other class it was not. There is therefore a substantial distinction between the position of the recipients of deductible corporate dividends and that of persons who received nondeductible corporate dividends. Likewise the same distinction exists between the class of persons who received deductible dividends and other taxpayers generally whose income was subjected to tax.

Whatever may have been the motive for the allowance of the deduction in the first instance which had the effect of relieving the deductible dividends from taxation, is not material. The fact exists that persons who received deductible dividends in 1933 occupy a very different position from that of persons whose dividend income was not deductible. If there was a reasonable basis for the classification upon which to base the deduction of certain dividends in 1933, that classification still exists and is a sufficient basis for the imposition of a tax upon the class. The Supreme Court of Wisconsin in its decision, 223 Wisconsin 319, upon this point said at page 324:

> "* * * It does not impress us as material upon the issue of discrimination whether the previous exemption was accomplished by taxing all income except that derived from dividends of Wisconsin corporations or by taxing all income and allowing the deduction of income from this source. These are mere matters of form. The net result was that this income had not been subjected to a normal tax. In searching for subjects of emergency taxation, the legislature for this very reason might impose a special tax for emergency relief upon the recipients of this type of income. The reason for imposing a special burden is as valid as that for exempting it from the normal burden. * * * Whatever may be the proper conclusion as to the classification, we do not think plaintiff can claim to have been discriminated against, when the whole pat-

tern of tax legislation is considered. It is not apparent to us that one who is exempt from the burden of annually responding to a normal income tax has been injured by requiring him to meet that of an occasional emergency tax. It might with equal or greater force be argued that the original act discriminated against persons receiving income from sources other than dividends of Wisconsin corporations. This being true, plaintiff has no standing to object to the classification adopted."

It is a reasonable classification because based upon substantial distinctions. What could be more reasonable than that in imposing an income tax it be laid upon that which has not been subjected to tax.

The Legislature of Wisconsin unquestionably realized that the recipients of deductible dividend income of 1933 bore an entirely different relationship to the tax burden than did persons who received nondeductible dividend income in that year, as well as other persons who received taxable income from sources in 1933, and made that the basis upon which it predicated the imposition of the special income tax thereon. Such classification is based upon real and substantial distinctions which bear a reasoable and direct relationship to ability to pay.

C. THE TAX INVOLVED HEREIN IS NOT A SUBSTITUTE TAX.

The contention of the appellant that the tax in question is arbitrary and discriminatory because the amount of tax thereby levied upon him is in excess of the amount of normal income tax which he would have paid if the dividends received by him in 1933 had not been deducted from taxable income of 1933 for normal income tax pur-

poses and therefore violates the Fourteenth Amendment, is without merit. Such argument presupposes that this tax is a substitute tax, which it is not. It replaces no other tax. Rather, it is a new and special tax for emergency relief purposes. Its avowed purpose is entirely different from that of normal income taxes which are levied to meet the ordinary costs of government.

Any attempt to compare the amount of tax falling upon a taxpayer by reason of the imposition of the tax by section 6 of Chapter 15 of the Laws of Wisconsin of 1935 with the tax he would have paid if the income by which the 1935 tax is measured had been included in 1933 taxable income for normal tax purposes of that year, indulges in sheer speculation. No one is able to say what tax would have been payable in 1933 had such income been included in taxable income. If the Legislature had seen fit to so include it very possibly such income might have been treated in some special manner. It is impossible to know what deductions, if any, might have been allowed against said income. The manner in which the Legislature might have dealt with losses sustained and what deductions, if any, would have been then allowed therefor is in the realm of the speculative.

The Emergency-Income Tax on 1931 incomes imposed by section 4 of Chapter 29 of Laws of Wisconsin, Special Session of 1931-1932, adequately illustrates this point. There, for the purposes of that tax, dividends from corporations subject to Wisconsin tax in 1931 were included in taxable income of 1931 by express provision. However losses on the sale or disposition of stocks, bonds and other securities, were not deductible in arriving at taxable income unless such assets constituted the regular stock in trade of the taxpayer or were held by him in

the course of his regular trade or business. The legislature there handled the deduction for losses sustained in a special manner. Section 2 of Chapter 15, Laws of Wisconsin of 1935 as discussed herein later under point D also is illustrative.

The Legislature of Wisconsin in imposing taxes for emergency relief purposes in 1935 undoubtedly had in mind the imposition of said tax in as equitable a manner as possible. As no income received in the year 1933 had been subjected to any emergency tax for relief purposes, the income received in that year from deducted dividends had not been made the subject of any income tax in the hands of the recipients. In furtherance of the desire to impose the emergency relief burden equitably so far as possible it imposed this new and special emergency tax on income, which included the dividend income which had not borne any of the tax burden.

D. THE TAX IN QUESTION IS NOT INVALID BECAUSE RETROATIVE.

The appellant concedes that the retroactivity of an income tax, in and of itself, presents no constitutional question and does not render the tax invalid (Brief 27). It has long been established and is now well recognized that an income tax law may operate retroactively and impose a tax upon income received prior to its enactment.

> *U. S. v. Hudson,* (1937) 299 U. S. 498;
> *Cooper v. U. S.* (1930) 280 U. S. 409;

For more than a half century it has been settled that a law of Congress imposing a tax may be retrospective in operation.

Stockdale v. The Atlantic Ins. Co., (1874) 20 Wall. 323, 331;
Railroad Co. v. Rose, (1877) 95 U. S. 78, 80;
Railroad Co. v. U. S., (1880) 101 U.S. 543, 549;
Flint v. Stone Tracy Co., (1911) 220 U.S. 107;
Billings v. U. S., (1914) 232 U. S. 261, 262;
Brushaber v. Union Pac. R. Co., (1916) 240 U. S. 1,20;
Lynch v. Hornby, (1918) 247 U. S. 339, 343;
Hecht v. Malley, (1924) 265 U. S. 144, 164;
Burnet v. Wells, (1933) 289 U. S. 670;
U. S. v. Hudson, (1937) 299 U. S. 498;
Cooper v. U. S., (1930) 280 U. S. 409.

Each of the federal income tax acts adopted from time to time during the last seventy-three years has been retroactive, in that it applied to income earned, prior to the passage of the act, during the calendar year. The Act of October 3, 1913, Chapter 16, 38 Statutes 114, 166, which taxed all income received after March 1, 1913, was specifically upheld in *Brushaber v. Union Pacific R. Co.,* (1916) 240 U. S. 1, 20, and in *Lynch v. Hornby,* (1918) 247 U. S. 339, 343. Some of the acts have taxed income earned in an earlier year. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863; this additional tax being imposed after the taxes for the year had been paid. In *Stockdale v. The Atlantic Ins. Co.,* (1874) 20 Wall. 323, 331, Mr. Justice Miller said:

> "No one doubted the validity of the tax or attempted to resist it."

The Act of February 24, 1919, Chapter 18, Title 2, 40 Stats. 1507, 1058-1088 (Com. St. 6336 1/8 a et seq.) which taxed incomes for the calendar year 1918, was applied, without question as to its constitutionality, in *United States v. Robbins,* (1926) 269 U. S. 315, and numerous other cases

The Corporation Tax Act of August 5, 1909, Chapter 6, 38, 36 Stats. 11, 112 (Comp. St. 7280), applying to all net incomes for the calendar year was sustained in *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107. The Acts of March 3, 1917, Chapter 159, 39 Stat. 1000, and of October 3, 1917, Chapter 63, 40 Stat. 300, 302 (Comp. St. 6336 3/8 a et seq.), imposing excess profits taxes on the profits earned during the calender year, were so applied in *La-Belle Iron Works v. U. S.*, (1921) 256 U. S. 377, *Green-port Basin & Construction Co. v. U. S.*, (1923) 260 U. S. 512 and in other cases. The validity of the Act of February 24, 1919, Chapter 18, Title 3, 40 Stat. 1057, 1088 (Comp. St. 6336 7/16 a et seq.), taxing excess profits earned during the calendar year 1918, has never been questioned. See also *Willcuts c. Milton Dairy Co.*, (1927) 275 U. S. 215; *Blair v. Oesterlein Mach. Co.*, (1927) 275 U. S. 220; *Porto Rico Coal Co. Inc., v. Edwards* (D. C. N. Y.), (1921) 275 Fed. 104; *National Paper & Type Co. v. Edwards* (D. C. N. Y.), (1923) 292 Fed. 633. The Munition Manufacturer's Tax, imposed by the Act of September 8, 1916, Chapter 463, Title 3, 39 Stat. 756, 780 (Comp. St. 6336 1/4 a et seq.), applied to the 12 months ending December 31, 1916. See also *Carbon Steel Co. v. Lewellyn*, (1920) 251 U. S. 501; *United States v. Anderson*, (1926) 269 U. S. 422, 435. The Act of February 24, 1919, Chapter 18, 40 Stat. 1057, 1126 (Comp. St. 5980 n et seq.), which materially increased the capital stock tax, made the increase retroactive to July 1, 1918. In *Hecht v. Malley*, (1924) 265 U. S. 144, 164, these retroactive provisions were held to validate taxes erroneously assessed under an earlier act and paid before the passage of the Act of 1919.

Except for the peculiar tax involved in *Nichols v. Coolidge*, (1927) 274 U. S. 531, no federal revenue measure

has been held invalid on the score of retroactivity. The need of the government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive.

The above principles have been specifically applied to a retroactive special income tax upon only one class of income.

U. S. v. Hudson, (1937) 299 U. S. 498.

In Wisconsin there is no express constitutional prohibition against retroactive tax measures and it is the settled law of that State that income tax laws may operate retrospectively.

Income Tax Cases, (1912) 148 Wis. 456, 514 (writ of error dismissed 231 U. S. 616);
State ex rel. Globe Tubes Co. v. Lyons, (1924) 183 Wis. 107, 124;
Cliffs Chemical Co. v. Wisconsin Tax Comm. (1927) 193 Wis. 295, 302, (writ of error dismissed 277 U. S. 574);
West v. Tax Comm., (1932) 207 Wis. 557, 562;
Van Dyke v. Tax Comm., (1935) 217 Wis. 528.

In *State ex rel. Globe Steel Tubes Co. v. Lyons,* (1924) 183 Wis. 107, it was said at page 124:

"The question of the invalidity of a retroactive provision of the income tax act was urged in *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, but the court denied the contention in a brief statement at page 514. This decision is cited in 25 Ruling Case Law, 795, and in Black, Income Taxes (4th ed.) sec. 22. The United States supreme court has held to the same effect. *Stockdale v. Insurance Cos.* 30 Wall. 323. The provision does not violate the federal constitution. *Bankers Trust Co. v. Blodgett,* 260 U. S. 647, 43 Sup. Ct. 233; note in 11 A. L. R.

518. Some of the states have constitutional prohibitions against retroactive laws. Decisions of the courts based on such provisions are not applicable here."

In *West v. Tax Comm.,* (1932) 207 Wis. 557, it was pointed out at page 562:

"* * * That it was intended to be retroactive in the sense above stated there can be no doubt, in the face of the absolute provision of sec. 27 of that chapter above quoted. That the fact that it was made retroactive does not render it unconstitutional is equally well settled. The first income tax act passed, operated upon income retroactively. It imposed a tax upon income already earned for that portion of the year 1911 intervening between January 1st and the passage of the act. The contention that this rendered the act unconstitutional was summarily dismissed by the court as too trivial to warrant discussion. *Income Tax Cases,* 148 Wis. 456, at p. 514 (134 N. W. 673, 135 N. W. 164). This question received more extended consideration in *State ex rel. Globe Steel Tubes Co., v. Lyons,* 183 Wis. 107, 197 N. W. 578, with like result. The supreme court of the Unted States holds that a tax imposed upon income alreay earned does not offend against the constitution of the United States. *Cooper v. U. S.* 280 U. S. 409, 50 Sup. Ct. 164. The legislation of this state has frequently imposed income taxes upon income already earned. Such was the surtax provided for the payment of the soldiers' bonus by ch. 667, Laws of 1919, and such also is the surtax provided for emergency relief by ch. 29, Laws of the special session of 1931. By our present discussion we have perhaps accorded to appellant's contention a dignity to which the court did not consider it entitled in the *Income Tax Cases,* but we have done so in the hope of placing the question at rest."

To the same effect is *Van Dyke v. Tax Comm.,* (1935) 217 Wis. 528, 548-549.

In view of the foregoing there can be no doubt but that the Legislature had power to make the 1935 emergency relief income tax law applicable to said 1933 dividends.

There being no prohibition in the constitution against retrospective income tax legislation as such, it follows that such laws are valid and must be sustained until it is clearly demonstrated that their operative effect in fact contravenes some express provision of the constitution. Until a law reaches that point, wherever that may be, it must be held valid.

It has been recognized that the retroactivity of an income tax law which imposes a tax upon income of the year prior to its enactment is within the period of permissible retroactivity.

> *Stockdale v. The Atlantic Ins. Co.*, (1874) 20 Wall. 323, 331;
> *U. S. v. Robbins*, (1926) 269 U. S. 315;
> *Willcutts v. Milton Dairy Co.*, (1927) 275 U. S. 215;
> *Blair v. Oesterlein Mach. Co.*, (1927) 275 U. S. 220;
> *Louisville Provision Co. v. Glenn*, (D. C. Ky. 1937) 18 Fed. Sup. 423;
> *West v. Tax Comm.*, (1932) 207 Wis. 557.

In *Stockdale v. The Atlantic Ins. Co.*, (1874) 20 Wall. 323, this court in sustaining an income tax law which was assailed because retroactive in operation, said at page 331:

> "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted, much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of

the previous year, although one tax on it has already been paid, and no one doubted the validity of the tax or attempted to resist it."

It is thus clearly recognized by the above cases that the period of retroactivity during which an income tax may be operative extends to and includes a year that has closed at the time of enactment of the law. A tax law enacted during 1934 upon 1933 income would thus fall within the period of retroactivity which has been recognized. In order that the tax here in question be sustainable it is not necessary that the limits of permissible retroactivity be ascertained, but it is sufficient that such tax be operative within the period of permissible retroactivity. As was said by the Supreme Court of Wisconsin at page 327 in its decision herein, reported in 223 Wisconsin 319:

> "* * * While the present tax may approach or reach the limit of permissible retroactivity, it does not ~~reach~~ EXCEED it."

Bill No. 48A, which became Chapter 15, Laws of Wisconsin of 1935 was introduced in the Assembly of the Wisconsin Legislature on January 25, 1935. The Legislature had convened in regular session on January 9, 1935. Section 6 of said Capter 15 as enacted was substantially the same in the bill as introduced. The ony amendments thereto were in phraseology and in respects not here material. Upon the date of introduction it was referred to committee and upon passage by the Assembly on February 15, 1935 was sent to the Senate. The Senate adpoted an amendment thereto and concurred therein as amended on February 28, 1935. Upon concurrence by the Assembly on March 6, 1935, the bill was sent to the Governor of Wisconsin for approval. He approved it on March

14, 1935 and the law became effective by its terms upon publication on March 27, 1935.

The time of retroactivity of this tax is an extension for only a very short time beyond that which has been recognized as being within the period of permissible retroactivity. The mere time element of retroactivity is not in and of itself a controlling factor. The courts have not defined the limit to which an income tax may be retroactive. No case has made any attempt to do so. None of the cases say that beyond a certain point a tax may not be retroactive in operation. The farthest that any decision has gone is to hold that the retroactivity of the tax there in question was within the time permitted. The cases do not hold, and there is no indication in any of them, that a tax which is retroactive beyond the periods there recognized would be invalid. Thus beyond the periods of retroactivity which have been recognized there must exist time during which an income tax may operate retroactively and be valid. As there is no constitutional objection to retroactivity as such by reason of the mere lapse of time, a retroactive tax must be valid until its operation produces some result which violates an express provision of the constitution.

A retroactive income tax is valid up to the point where it is shown as a matter of fact that it has no relation to ability to pay. However, until it is shown as a fact that the tax goes back beyond the periods of recognized retroactivity to a point where it no longer has any relationship to ability to pay, there can be no question as to the validity of the tax and it must be sustained. Where no such showing is made there is no basis for questioning the validity of the tax on that ground.

It is a basic and fundamental principle that a presumption exists in favor of the constitutionality of a

statute. Thus, the presumption of constitutionality of a statute dealing with a subject clearly within the scope of legislative power prevails in the absence of some factual foundation of record for declaring it unconstitutional.

O'Gorman & Young v. Hartford F. Ins. Co., (1931), 282 U. S. 251.

When a taxpayer asserts that an income tax is so retroactive as not to relate to ability to pay the burden is upon him to make a showing to that effect. This the appellant has failed to do. There is nothing in the record that shows any facts during the intervening period that makes this tax operative in any manner in relation to ability to pay differently than if the tax had been enacted during the periods of retroactivity which have been recognized. Until the retroactive operation of an income tax reaches a point where the court can say as a matter of law that it inpinges some provision of the constitution, the tax must be sustained unless the above factual burden has been fulfilled. Certainly the short time that this tax is retroactive beyond the periods that have been recognized can not reasonably be the basis for the court to say that as a matter of law the tax is retroactive for too long a time. Thus neither as a matter of fact nor as a matter of law is the tax involved herein shown to be invalid because retroactive.

It is to be further noted that Chapter 15 of the Laws of Wisconsin of 1935, of which the tax here involved is a part, levied other special income taxes for emergency relief purposes. Section 2 of the Act imposed a special emergency relief tax upon income of the year 1934. The tax imposed by section 2 was in addition to the normal income tax on 1934 incomes. Not only was the tax levied by said section 2 imposed on the income of 1934 which

was subject to normal income taxes for that year under the general income tax law, Chapter 71, Wisconsin Statutes, but it was also imposed upon the dividend income of 1934 received from all corporations subject to Wisconsin income tax in 1934; paragraph (a), subsection (2), section 2, Chapter 15, Laws of Wisconsin of 1935. That is, for the purposes of the emergency tax on 1934 income, the deduction of the dividends allowed under section 71.04, subsection (4) Statutes of Wisconsin for normal income tax purposes, was not permitted. Such dividend income was thus included in the 1934 income taxed by said subsection (2) and such dividends were thereby subjected to the relief tax levied by section 2 of said Chapter 15. In addition, it is significant that section 2 not only expressly limited the deduction of losses from the sale of assets to a graduated basis dependent upon the length of time the assets had been held, but also expressly limited the deduction of such losses to only that extent to which gains from the sale of such assets were included in reported income. Thus, not only were dividends of 1934 of the type taxed by section 6, included in 1934 taxable income for relief purposes but the deduction for losses was restricted very narrowly. Under the tax scheme set out in said section 2 the losses of the type which the taxpayer suffered in 1933, had they occurred in 1934 would not have been deductible in deteiming taxable income for 1934 relief t-x purposes.

At the time of the passage of said Chapter 15 the Legislature of Wisconsin had before it the problem of providing means to raise revenue in such amount as would meet the estimated needs for emergency relief purposes in 1934. Unquestionably the Legislature looked over the whole tax field in an endeavor to work out a scheme of taxation that would spread the additional tax burden

as broadly as possible so as to fall upon those best able to pay and be distributed as equitably as the conditions would permit. Income tax returns in Wisconsin are filed annually on or before March 15th, section 71.09 (4), (a), Wisconsin Statutes. The last returns to which the Legislature could resort in gathering information as to incomes were those filed March 15, 1934 in respect to 1933 incomes. From such returns the Legislature unquestionably ascertained the total amount of dividends received in 1933 which had been deducted in that year for normal income tax purposes and that said dividends had not been subjected to any state income tax as there was no emergency relief tax on the 1933 incomes. In furtherance of the desire to spread the emergency relief burden as broadly and equitably as it could, the legislature unquestionably felt that the dividends deducted in 1933 should bear a part of this additional revenue demand and that the recipients thereof were better able to pay the same than other persons whose income had been subjected to tax. Accordingly, it imposed the special income tax provided for in section 6.

While it is true that nominally the rates in section 6 are higher than those in the normal income tax law applicable to 1933 income and higher than the rates in the additional relief tax on 1934 incomes set out in section 2 of the same Act, it must be considered that the inclusion of such 1933 dividends in taxable income with the restriction on deduction of losses as provided in section 2 would bring them normally in the higher brackets. Had the taxpayer's 1933 dividends been included in 1933 taxable income under the same complete scheme as that of section 2, a tax would have been payable practically equivalent to the tax falling due under section 6. As was said by

the Wisconsin Supreme Court in its opinion in this case, 223 Wisconsin 319, at pages 324 and 325:

> "* * * Some point is made of the fact that the emergency tax upon this particular type of income is at a rate higher than the normal tax. We are not satisfied that such is the case. While the rates are nominally higher, it may well have been considered that this income, if added to the balance of the taxpayer's income, would normally be taxed in the higher rather than the lower brackets of the normal tax, and this factor could be taken account of in establishing rates for the special tax. Recognition of this principle appears to have been given in the case of *Colgate v. Harvey,* 296 U. S. 404, 56 Sup. Ct. 252. Whatever may be the proper conclusion as to the classification, we do not think plaintiff can claim to have been discriminated against when the whole pattern of tax legislation is considered. It is not apparent to us that one who is exempt from the burden of annually responding to a normal income tax has been injured by requiring him to meet that of an occasional emergency tax. It might with equal or greater force be argued that the original act discriminated against persons receiving income from sources other than dividends of Wisconsin corporations. This being true, plaintiff has no standing to object to the classification adopted."

The Legislature was able, by referring to the 1933 income tax returns which had been filed, to accurately determine the amount that would be raised by levying the tax imposed by section 6. An estimate had been made of the amount of revenue needed by the State of Wisconsin for relief purposes in 1935. Had the tax of section 6 not been levied, it would have been necessary to have imposed the other taxes of Chapter 15 on estimated 1934 incomes at higher rates. This the Legislature would have been forced to do in order to raise revenue of sufficient amount

to meet the estimated needs. The whole scheme of Chapter 15 demonstrates that it was the intent and purpose of the Legislature in passing it to distribute the burdens of the relief tax load in relation to ability to pay. The tax levied by section 6 is imposed upon income of the most recent year for which income tax reports were on file. Not only are there no facts shown which make a tax on the income of 1933 relate any less to ability to pay than a tax on income of the year next preceding the enactment of an income tax law, but the situation which did exist was such that the Legislature, in the exercise of its discretion, could justifiably say that the tax of section 6 bore a very definite relation to ability to pay. This is especially true when it is realized that the session of the Legislature in 1935 which convened on January 9, 1935 was the first Legislature of the State of Wisconsin which had met following the filing on March 15, 1934 of income tax returns of 1933 income. The last previous session of the Legislature thereto was the special session which had adjourned February 3, 1934.

The power to tax is essential to the operation of government. It is as broad as the demands which are properly made upon the government. The methods of exercising such power must be considered in light of the exigencies of the cocasion. The Legislature must be given a wide discretion in exercising such tax power, especially in times of emergency when unusual and additional demands are made upon the revenues of the government. The imposition of the tax here involved is a mode of exercising that power which, in view of the circumstances that were existent at the time the legislation was enacted, is certainly within the field of reasonable discretion of the Legislature of Wisconsin. Certainly the field of legislative discretion in exercising of the tax power is not to

be restrained or restricted by the mere lapse of a few months beyond the time which has been heretofore recognized as proper, and more especially when no showing has been made of anything occurring therein that in any manner affects the reasonableness of the exercise of such power.

CONCLUSION

Upon the foregoing reasoning it is submitted that section 6 of Chapter 15 of the Laws of Wisconsin for 1935 is valid legislation and imposes an income tax that is not contrary to the provisions of section 1 of the 14th Amendment to the Constitution of the United States. The decision of the Supreme Court of the State of Wisconsin sustaining the same should be affirmed.

Respectfully submitted,

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